No. 14-232

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT OF ARIZONA

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify creating legislative districts of unequal population that deviate from the one-person, one-vote principle of the Equal Protection Clause?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby Cnty., Ala.* v. *Holder*, 133 S. Ct. 2612 (2013)?

PARTIES

The appellants here, plaintiffs below, are Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. MacKean, and Sherese L. Steffans. These individuals are Arizona citizens and registered voters residing in an over-populated Arizona legislative district.

Appellees, defendants below, are the Arizona Independent Redistricting Commission (the commission or IRC), Colleen Mathis, Linda C. McNulty, Scott D. Freeman, Richard Stertz, and Cid R. Kallen (replacing former Commissioner Jose M. Herrera pursuant to Fed.R.Civ.P. 25(d)), in their official capacity as members of the commission, and Michele Reagan, in her official capacity as Arizona Secretary of State. Michele Reagan replaces Ken Bennett, the former Secretary of State named in his official capacity in previous filings.

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OPINION BELOW

In April 2014, the three-judge district court (Clifton, Silver, Wake, JJ.) entered a *per curiam* decision that is the subject of this appeal. The opinion in *Harris* v. *Ariz. Indep. Redistricting Comm'n*, is published at 993 F. Supp.2d 1042 (D. Ariz. 2014). The *per curiam* opinion is at J.S. App. 3a-81a. Judge Silver's concurrence and dissent is at J.S. App. 82a-104a. Judge Wake's concurrence and dissent is at J.S. App. 105a-145a.

JURISDICTION

A two-judge majority denied the *Harris* voters' Equal Protection challenge. The *Harris* voters timely filed their notice of appeal on June 25, 2014. J.S. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. On June 30, 2015, this Court noted probable jurisdiction.

STATUTES AND CONSTITUTIONAL PROVISIONS

The statutes and constitutional provisions are included in the appendix to appellants' jurisdictional statement.

STATEMENT OF THE CASE

A. Summary of this case.

This is an Equal Protection challenge brought under this Court's one-person, one-vote jurisprudence.[1] See

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1. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Gray v. *Sanders*, 372 U.S. 368, 380 (1963); *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964); and *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964).

The commission diluted or inflated the votes of almost two million Arizona citizens when the commission intentionally and systematically overpopulated sixteen Republican districts while underpopulating eleven Democrat districts. By overpopulating Republican districts, the commission unfairly diluted the vote of thousands of Arizona citizens. Arizona citizens living in these overpopulated districts have challenged the commission's reapportionment scheme.

The three-judge district court found the commission malapportioned Arizona's legislature for two reasons: (1) the desire to give the Democrat party a political advantage; and, (2) because the commission's lawyer and consultant said the Justice Department would not preclear the reapportionment scheme under section 5 of the Voting Rights Act unless the commission underpopulated eleven districts to create (or attempt to create) minority "ability-to-elect" districts. But neither of these reasons justifies creating unequally-populated legislative districts that dilute the weight of the vote of thousands of Arizona citizens.

If the commission had *equally* reapportioned Arizona voters into legislative districts for the partisan purpose of benefiting the Democrat party we would not be here. The problem is that the commission *unequally* apportioned Arizona voters with the intent of creating an advantage for the Democrat party. And, in doing so, it systematically diluted or enhanced the electoral weight of 3,907,652 Arizona voters. See J.S. Suppl. App. at SA59.

For more than sixty-years this Court has emphasized the constitutional primacy of population equality. *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1271 (2015), is the most recent example.[2]

Nevertheless, two of the three district court judges upheld the commission's unequal reapportionment scheme even when the scheme unequally diluted the weight of thousands of Arizona voters. Judges Clifton and Silver believed that, because the commission's advisors told the commissioners the Justice Department required unequally-populated districts to obtain preclearance under the Voting Rights Act, the commission therefore had a "good faith" belief that it could unequally populate Arizona's legislative districts. This rationale is wrong for two reasons. First, neither the Voting Rights Act nor the Justice Department can require the commission to unequally populate Arizona's legislative districts. The Justice Department has never had the power – nor has it ever claimed the power – to demand States malapportion state legislative districts to obtain preclearance. Second, even if the Voting Rights Act could have once authorized the Justice Department to condition preclearance upon the commission unequally apportioning Arizona's legislative districts, this justification was eliminated by this Court's decision in *Shelby Cnty., Ala.* v. *Holder*, 133 S. Ct. 2612 (2013).

So we are left with this: The commission's reapportionment scheme violates the one-person,

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2. *Id.* ("The requirement that districts have approximately equal populations is a background rule against which redistricting takes place.")

one-vote standard. There is no dispute on this point. And, because the two justifications offered for this malapportionment (gaining partisan advantage and obtaining Justice Department preclearance, especially after *Shelby County*) are not legitimate reasons to deviate from the constitutional one-person, one-vote prerogative, the commission's reapportionment of Arizona's state legislature should be remanded with instructions to redraw Arizona's legislative districts consistent with this Court's one-person, one-vote standard.

B. The Arizona redistricting commission.

Arizona is divided into thirty legislative districts. The voters of each district elect two representatives to the Arizona House and one representative to the Arizona Senate. In most states the decennial reapportionment of legislative districts (both congressional districts and state house and senate districts) is done by the state legislature.[3] But in Arizona this is not so.

In 2000, a citizen initiative amended Arizona's Constitution to "tak[e] the redistricting power away from the Arizona Legislature and put[] it in the hands of a politically neutral commission of citizens who are not active in partisan politics...to create fair districts that are not 'gerrymandered' for any party's or incumbent's

3. Some states use advisory bodies to assist in reapportionment. But Arizona is one of very few states that has removed its state legislative reapportionment process from legislative or electoral oversight. See *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2662 n.6 (2015).

advantage***."[4] This initiative, Proposition 106, aimed to "end[] the practice of gerrymandering and improv[e] voter and candidate participation in elections by creating an independent commission of balanced appointments to oversee the mapping of fair and competitive congressional and legislative districts."[5] Harris, J.S. App. at 57a; see also *id.* at 146a-152a (Ariz. Const. art. IV, pt. 2, § 1(3)-(23)).

This amendment "remove[d] redistricting authority from the Arizona Legislature and vest[ed] that authority in an independent commission ***." *Ariz. State Legislature*, 135 S. Ct. at 2658. The primary purpose for delegating reapportionment to an "independent" commission was "ending the practice of gerrymandering." *Id.* at 2661.

The Arizona Constitution directs the commission to reapportion Arizona's legislature in conformity with six enumerated neutral criteria: (1) The United States Constitution and Voting Rights Act, (2) creating equally-populated districts; (3) geographic compactness and contiguity; (4) preserving communities of interest; (5) geographic features such as municipal and county boundaries; and (6) political competitiveness "if it would create no significant detriment to the other goals." Ariz. Const. art. IV, pt. 2, § 1(14)(F); see also *Harris*, J.S. App.

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4. Arizona Secretary of State, 2000 General Election: Ballot Measures, "Fair Districts, Fair Elections," <http://apps.azsos.gov/election/2000/General/ballotmeasures.htm> (last visited August 25, 2015).

5. Ballot title, "Citizens Independent Redistricting Commission Initiative," available at:

<http://apps.azsos.gov/election/2000/info/pubpamphlet/prop2-C-2000.htm> (last visited August 25, 2015).

at 24a. To reduce the influence of partisanship in Arizona's reapportionment, the Arizona Constitution further provides: "[p]arty registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals." J.S. App. at 151a.

The IRC is a five-member commission. Another unelected commission, the Arizona Commission on Appellate Court Appointments, provides three slates of individuals – one slate of ten Republicans, one slate of ten Democrats, and one slate of five individuals "not registered with any [political] party." *Ariz. Indep. Redistricting Comm'n* v. *Brewer*, 275 P.3d 1267, 1268 (Az. 2012); see also Ariz. Const. art. IV, pt. 2, § 1(3); *Harris*, J.S. App. at 13a-14a. The Republican and Democrat leadership of the Arizona House and Senate select four members of the commission – two Democrats and two Republicans. The Democrats selected Jose Herrera and Linda McNulty and the Republicans selected Scott Freeman and Richard Stertz.

Once designated, these four members select a fifth member from the list of the five persons on the "unaffiliated" slate. *Harris*, J.S. App. 13a. The Republican members noted that the five "unaffiliated" candidates were not truly unaffiliated but were, in practice, aligned with the Democrat party. *Id.* at 14a. Despite these objections the commission appointed Colleen Mathis as the fifth commissioner. *Id.* at 13a. By law, Mathis chaired the commission. *Ibid.*

The commission then selected its mapping consultant and attorneys. Over the objection of the Republican

members, the commission selected a Democrat consultant to draw the map. *Harris*, J.S. App. at 17a-18a. This consultant "had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns." *Id.* at 17a; see also *Ariz. State Legislature*, 135 S. Ct. at 2691. The Democrat commissioners also selected a Democrat attorney of their choice to advise them, but (joined by Chairwoman Mathis) voted to deny Republican members the opportunity to select an attorney of their choice. *Harris*, J.S. App. at 15a-16a. Instead, Mathis and the Democrat members selected an attorney to represent the Republican commissioners. *Id.* at 16a.

Chairwoman Mathis' partisan bias "provoked sufficient controversy [such] that the Governor of Arizona, supported by two-thirds of the Arizona Senate, attempted to remove [Chairwoman Mathis] for 'substantial neglect of duty and gross misconduct in office.'"[6] *Ariz. State Legislature*, 135 S. Ct. at 2691 (citing *Brewer*, 275 P.3d at 1275). The Arizona Supreme Court reinstated Mathis because it concluded removing Mathis exceeded the Governor's authority.[7] *Id.*

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6. "Secretary of State Ken Bennett, in his capacity as Acting Governor while Governor Brewer was out of state sent a letter to Commissioner Mathis removing her from the IRC, effective upon occurrence of two-thirds of the Senate." *Brewer*, 275 P.3d at 1269.

7. The fact that two-thirds of the Arizona Senate and Arizona's Governor could not remove the commission's chairperson demonstrates how far the commission members are removed from political accountability.

C. How the commission reapportioned Arizona's state legislature.

As we note above, "Arizona has attempted to '*remove* redistricting from the political process ***.'" *Harris*, J.S. App. at 89a (Silver, J., concurring and dissenting) (quoting *Brewer*, 275 P.3d at 1273) (emphasis in original). To this end, Arizona's Constitution provides new legislative districts must be drawn in light of the traditional neutral criteria quoted above. Arizona's Constitution also specifies a specific procedure to map legislative districts in a non-partisan manner that prioritizes equal population.

1. The Grid Map

Arizona's Constitution requires the commission to begin reapportionment with a grid map and "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14); J.S. App. at 150a. The commission created two alternative grid maps, one beginning in the center of the state and moving counterclockwise, and the other starting in the southeast corner of the state moving clockwise. *Harris*, J.S. App. at 19a. The commission voted to adopt the second of these grid maps starting in southeast Arizona. *Id.* The grid map and a table showing its deviation from the ideal of equal population is at J.A. Suppl. App. at SA25, SA50.

The commission selected the grid map with a population deviation of 4.07%.[8] J.S. App. 19a. The

8. Population deviation is the percentage by which districts deviate from the ideal of having population equally distributed among all election districts.

commission never explained why its grid map began with a population deviation of more than four percent instead of "districts of equal population" as Arizona's Constitution requires. Ariz. Const., art. IV, pt. 2 § 1 (14); J.S. App. at 150a; *Harris*, J.S. App. at 19a. But no matter the reason, the commission began with a grid map that was nearly double the two-and-one-half percent deviation of Arizona's legislative districts as reapportioned following the 2000 decennial census. *Ibid.*

2. The Draft Map

After the grid map is selected, the Arizona Constitution directs the commission to adjust the (supposedly equally-populated) grid map to comport with the Voting Rights Act and United States Constitution and to accommodate the neutral redistricting criteria of (1) equally-populated districts; (2) geographically compact and contiguous districts; (3) respecting communities of interest; (4) using visible geographic features and municipal boundaries; and, (5) creating competitive districts where making a district more competitive does not compromise other factors. Ariz. Const. art. IV, pt. 2, § 1(14)(F); *Harris*, J.S. App. at 24a. Arizona's Constitution does not recognize drawing legislative districts to provide a partisan advantage to one political party to be a legitimate redistricting criteria.

i. The commission's consultants told the commission to modify the grid map to create at least ten underpopulated "ability-to-elect" districts because they claimed doing so was necessary for the Justice Department to approve the scheme.

A redistricting scheme has an impermissible effect under section 5 of the Voting Rights Act if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997) (internal quotation omitted). Retrogression refers to a reduction in minority voting strength. Whether retrogression exists is determined by comparing "baseline" or "benchmark" districts (under the previous apportionment) with those created in a new redistricting scheme. Section 5 prohibits "only those redistricting plans that would have the purpose or effect of worsening the position of minority groups." *Shelby Cnty.*, 133 S. Ct. at 2626. "Section 5 was intended to halt actual retrogression in minority voting strength ***." *Riley* v. *Kennedy*, 553 U.S. 406, 432 (2008) (quoting *City of Lockhart* v. *United States*, 460 U.S. 125, 133 (1983)).

In its preclearance submission the commission told the Justice Department that there were seven baseline benchmark districts in Arizona's legislature. *Harris*, J.S. App. at 35a ("In its written submission, the Commission argued that the benchmark plan contained seven ability-to-elect districts, comprised of one Native American district and six Hispanic districts."). As such the commission could have satisfied the prohibition against retrogression by drawing a new map with seven minority ability-to-elect districts.

But, even though the commission told the Justice Department there were seven benchmark districts, the commission's advisors told the commissioners they needed to create at least ten minority ability-to-elect districts – three more than existed in the baseline plan. *Harris*, J.S. App. at 25a, 27a, 30a. The commission's consultant, Bruce Adelson, "informed the Commission at that time that he believed the 2002 map that was ultimately approved had nine districts in which minorities had an ability to elect their preferred candidates." *Id.* at 25a.

The commission was also told that winning Justice Department preclearance justified deviations from this Court's one-person, one-vote principle. "Adelson advised the Commission that underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent." *Harris*, J.S. App. at 30a. The commission's legal counsel also told the commissioners "that some population disparity was permissible if it was a result of compliance with the Voting Rights Act."[9] *Id.* at 28a.

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9. The *per curiam* opinion explained, "[b]ecause the preclearance process focused on making sure there was no retrogression, that number [nine districts] was the benchmark, meaning that the new plan had to achieve at least the same number of ability-to-elect districts." *Harris*, J.A. App. at 25a. The *per curiam* opinion also explained that gaining Justice Department preclearance approval is a mystical undertaking without clear standards or goal-posts. "[S]tate officials do not know exactly what is required to achieve preclearance. *** [T]he Department of Justice relies on a variety of data in assessing retrogression, rather than assessing a fixed goal that states can easily ascertain." *Id.* at 22a. "[T]he preclearance process with respect to any particular plan is generally an opaque one." *Ibid.*

The commission's attorneys and consultants advised the commission to create at least ten ability-to-elect districts by underpopulating those districts. *Harris*, J.S. App. at 30a. The *per curiam* decision described this as an effort to "overshoot the mark." *Id.* at 23a.

Armed with this advice, the commission "used what it called the 'Cruz Index' to assess whether voters in an area might support a Hispanic candidate." *Harris*, J.S. App. at 26a. The "Cruz Index" was devised by two members of the commission and derived from "the 2010 election for Mine Inspector, a statewide race pitting Joe Hart, a Republican non-Hispanic white (or Anglo) candidate against Manuel Cruz, a Democrat, Hispanic candidate." *Ibid.* Using the "Cruz Index" the commission redrew Arizona's legislative districts – especially districts 24, 26 and 8. *Id.* at 31a-33a. "A consequence of these changes was an increase in population inequality." *Id.* at 32a. But, as the district court found, "In using the Cruz Index to adjust district boundaries *** the commissioners used a measure that *equally reflected the ability to elect a Democratic candidate.*" *Id.* at 37a (emphasis added).

By a three-to-two vote the commission decided to change the draft map, especially as to districts 24, 26 and 8. *Harris*, J.S. App. at 35a. These changes were proposed by Democrat Commissioner McNulty and opposed by the Republican members. *Ibid.* The effect of these changes was to increase the population deviation and also increase (albeit slightly) Hispanic population in districts 24, 26 and 8. *Id.* at 34a. But even after McNulty's changes, the Hispanic population in each of these districts was still below thirty-five percent. *Ibid.* And the Hispanic citizen-voting-age-population – the actual percentage of Hispanic

citizens eligible to cast a ballot – was even lower. *Id.* at 243a-44a.

The Republican members objected to these changes because they were done not to create Hispanic ability-to-elect districts but instead to achieve partisan benefit for the Democrat party. Republican "Commissioner Stertz argued the change favored Democrats in District 8 while 'hyperpacking' Republicans into District 11." *Harris*, J.S. App. at 32a. The *per curiam* decision agreed and found, "[t]he Republican commissioners were correct that the change would necessarily favor Democratic electoral prospects." *Ibid.* Commissioner McNulty "did not propose any corresponding effort to make any Democrat-leaning districts more competitive." *Ibid.*

ii. The district court found the commission's second motive for creating unequal legislative districts was to benefit the Democrat party.

The district court also found the commission had a second motive – to unequally apportion Arizona's legislature in order to gain a partisan advantage for the Democrat party. "Judge Clifton correctly finds that the IRC was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact." *Harris*, J.S. App. at 107a (Wake, J., concurring and dissenting). Especially as to District 8, the *per curiam* decision found "the evidence clearly shows that partisanship played some role in its creation."[10] *Id.* at 78a.

10. Judge Silver likewise recognized "the *per curiam* opinion concludes partisanship did motivate certain changes." *Harris*, J.S. App. at 102a (Silver, J., concurring).

All three district court judges acknowledged partisanship was the reason (or, if not *the* reason, *a* reason) the commission redrew the draft map with these unequally-populated districts. Judge Silver acknowledged "Arizona has attempted to 'remove redistricting from the political process ***.'" *Harris*, J.S. App. at 89a (Silver, J., concurring and dissenting). But, Judge Silver found, "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." *Ibid.* Judge Silver observed, "[t]he redistricting process, with all its adversarial tensions, has *always* been recognized as a profoundly partisan process." *Ibid.* (citing *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973)) (emphasis in original).

The *per curiam* opinion also agreed "[w]ith respect to deviations resulting from Commissioner McNulty's change to District 8 between the draft map and the final map, we find that partisanship clearly played some role." *Harris*, J.S. App. at 36a. Judges Clifton and Silver explained that "strengthening minority ability-to-elect districts were also changes that improved the prospects for electing Democratic candidates. Those motivations were not at cross purposes. They were entirely parallel. *** [And i]t is highly likely that the members of the Commission were aware of this correlation." *Id.* at 37a-38a. Thus, the *per curiam* decision concluded, "[i]f an individual member of the Commission were motivated to favor Democrats, that could have been accomplished under the guise of trying to strengthen minority ability-to-elect districts." *Id.* at 38a.

All three judges also concluded (or assumed) "partisanship is not a valid justification for departing from perfect population equality." *Harris*, J.S. App. at

62a. But Judges Clifton and Silver nonetheless upheld the commission's reapportionment because, while they:

> assume[d] that seeking partisan advantage is not a legitimate consideration [to justify population deviations,] *** the deviations in the ten districts submitted to the Department of Justice as minority ability-to-elect districts were predominantly a result of the Commission's good-faith efforts to achieve preclearance ***. Partisanship may have played some role, but the primary motivation was legitimate.

Id. at 36a.

3. The Final Map

The commission ultimately produced a final map. The final map is attached at J.A. Suppl. App. SA55-SA58, and a table summarizing the population deviations in each district is at J.A. Suppl. App. SA59-62.

The final map reapportioned Arizona's legislature with population deviation of almost nine percent. Nine districts were overpopulated by more than two-percent and nine districts were underpopulated by more than two-percent. *Harris*, J.S. App. at 112a (Wake, J., dissenting).[11] This is a population deviation *four times greater* than

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11. Districts 7, 4, 27, 3, 2, 24, 19, 30 and 8 were all underpopulated by more than two percent and these districts are all Democrat-leaning districts. Districts 14, 20, 18, 28, 5, 16, 25, 17 and 12 were all overpopulated by more than two percent and these were all Republican-leaning districts. *Harris*, J.S. App. at 112a-113a (Wake, J., dissenting).

the legislative districts drawn by the prior commission.[12] *Ibid.* And the commission demonstrated they could have reapportioned the legislative districts with essentially zero population deviation because this is how the commission reapportioned Arizona's congressional districts.[13]

Importantly, the total population deviation in the final map was *not* the result of accommodating *any* of the traditional redistricting criteria such as compactness, contiguity and existing geographic boundaries. These race-neutral and partisan-neutral criteria never even entered the district court's discussion of how and why the commission unequally reapportioned Arizona's legislature. And, the commission's final map unquestionably failed to satisfy Arizona's constitutional directive that legislative districts be equally populated.

In January 2012, the commission adopted the final map by a three-to-two vote. The Democrat members and Chairwoman Mathis voted in favor and the Republican members voted against the reapportionment scheme. In February 2012, the final legislative map was submitted to the Justice Department. In April, the Justice Department approved the map. Arizona's 2012 and 2014 state legislative elections have been conducted under the commission's reapportionment scheme. Unless this

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12. The 2000 legislative map had a population deviation of less than two and one-half percent. *Harris*, J.S. App. at 112a.

13. See IRC website, congressional district population data table, available at:
<http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited August 31, 2015).

Court acts, the commission's reapportionment scheme will govern Arizona's elections until after 2020.

4. The 2012 and 2014 elections confirm the intended partisan advantage for the Democrat party.

The 2012 election was conducted using the commission's final map. The results of the 2012 and 2014 elections demonstrate the intention to confer a benefit upon the Democrat party was realized. The *per curiam* opinion noted, "The practical correlation between these two motivations was confirmed by the results of the 2012 election ***. The legislators elected from districts identified by the Commission as minority ability-to-elect districts were all Democrats." *Harris*, J.S. App. 37a-38a; see also *id.* at 9a-10a. Similarly, the results of the 2014 election demonstrated the commission's desired effect, with Democrats winning twenty-nine out of thirty senate and house seats in the ten ability-to-elect districts.

D. The district court litigation.

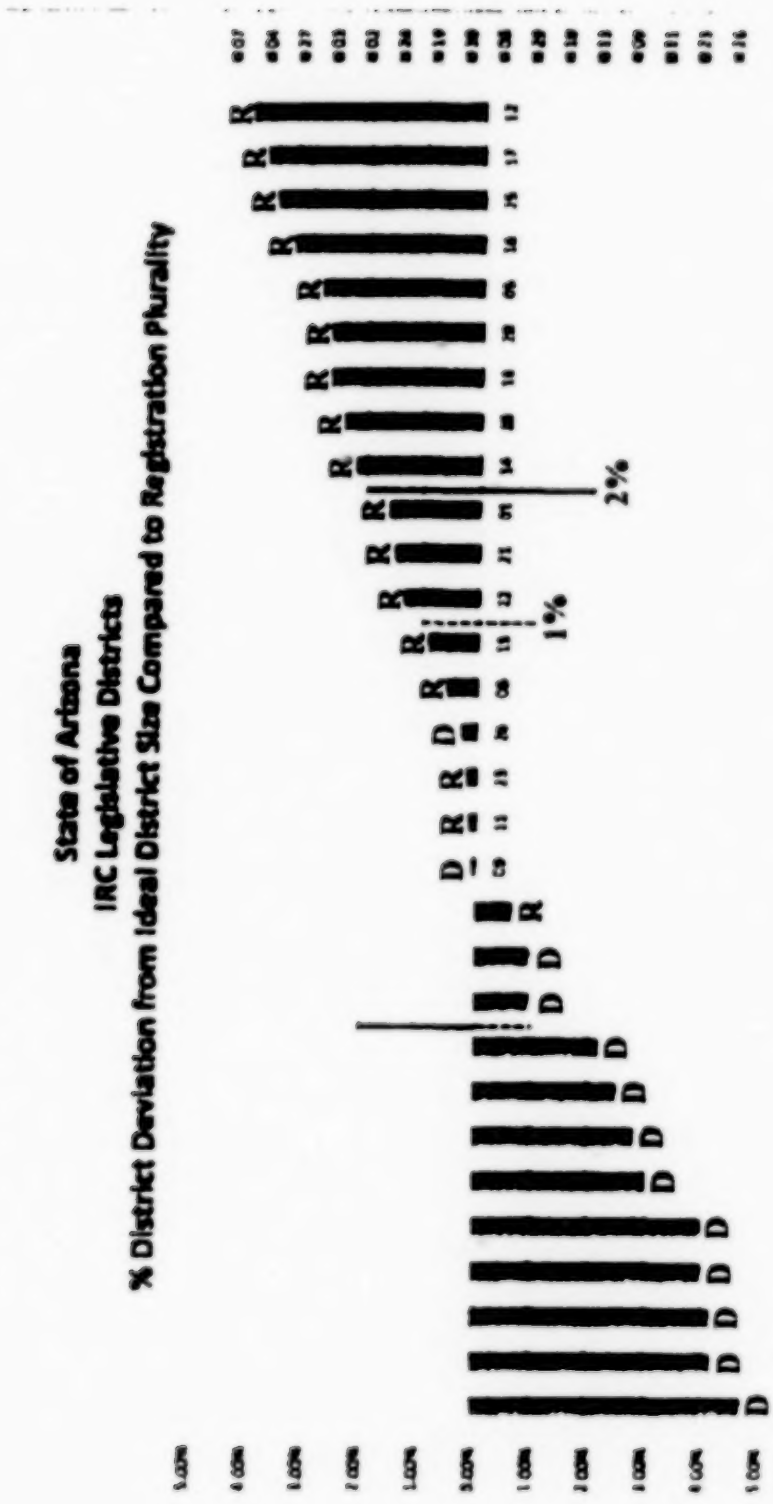
The Arizona citizens bringing this case reside in districts the commission over-populated. These Arizona citizens challenge the redistricting scheme because their votes were diluted. They seek redress through a declaration that the commission's final legislative map violated the Equal Protection Clause of the Fourteenth Amendment and the equal population requirement of Arizona's Constitution. *Harris*, J.S. App. at 7a.

In March 2013 the three-judge district court presided over a five-day trial. More than a year later, the court

issued a *per curiam* decision in which all three judges agreed partisanship was one of the reasons the commission unequally populated Arizona's legislative districts. Judge Clifton did not believe it was the *predominant* reason and Judge Silver did not believe it was the *only* reason for the population deviations. *Harris*, J.S. App. at 36a n.7, 63a n.10. The three judges also agreed (or agreed to assume for purposes of their decision) that achieving partisan advantage was not a legitimate reason to deviate from this Court's one-person, one-vote standard. *Id.* at 36a. "We assume that seeking partisan advantage is not a legitimate consideration." *Ibid.*

But Judges Clifton and Silver broke with Judge Wake to conclude "the Commission was predominantly motivated by a legitimate consideration [of] comply[ing] with the Voting Rights Act." *Harris*, J.S. App. at 38a. And, because of the purported desire to obtain preclearance approval from the Justice Department, Judges Clifton and Silver affirmed the commission's unequal apportionment of Arizona's legislature.

Judge Wake dissented from this part of the *per curiam* decision to find that the commission's final map systematically and intentionally underpopulated Democrat districts and overpopulated Republican districts for the purpose of gaining partisan advantage for the Democrat party. *Harris*, J.S. App. at 107a-108a. Judge Wake demonstrated this point with two exhibits:


State of Arizona
IRC Legislative Districts
% District Deviation from Ideal District Size Compared to Registration Plurality
2%
1%

			#	%
Democratic registration plurality	7	203,026	-10,041	-4.7
	4	204,143	-8924	-4.2
	27	204,195	-8872	-4.2
	3	204,613	-8454	-4.0
	2	204,615	-8452	-4.0
	24	206,659	-6408	-3.0
	19	207,088	-5979	-2.8
	30	207,763	-5304	-2.5
	8	208,422	-4645	-2.2
Republican registration plurality	14	217,693	+4625	+2.2
	20	218,167	+5099	+2.4
	18	218,677	+5609	+2.6
	28	218,713	+5645	+2.6
	5	219,040	+5972	+2.8
	16	220,157	+7089	+3.3
	25	220,795	+7727	+3.6
	17	221,174	+8106	+3.8
	12	221,735	+8667	+4.1

Harris, J.S. App. at 112a-113a. Judges Clifton and Silver did not disagree with this factual point.

Judge Wake found the commission's reapportionment scheme violated the Equal Protection Clause because gaining a partisan advantage for one political party is not a legitimate or rational state policy that justifies deviating from the one-person, one-vote ideal. *Harris*, J.S. App. at 116a-117a. He further found the commission's purported

desire to obtain preclearance approval by creating (or attempting to create) three additional minority ability-to-elect districts did not justify a reapportionment scheme with systematic population inequality. Judge Wake reached this conclusion because (a) the Voting Rights Act does not allow the Justice Department to require unequally-populated legislative districts; and (b) even if the Voting Rights Act did allow the Justice Department to require the commission to unequally apportion Arizona's legislative districts, this Court's decision in *Shelby County* eliminated that justification. *Id.* at 136a-37a, 144a-145a.

SUMMARY OF ARGUMENT

The commission's reapportionment of Arizona's legislature violates the one-person, one-vote principle of the Equal Protection Clause. The district court found only two reasons for the commission's nearly nine-percent deviation from the one-person, one-vote ideal.

The first reason was the desire (held by three of the five commissioners) to provide partisan benefit to the Democrat party by deliberately and systematically underpopulating Democrat districts, thereby inflating the weight of these Arizona citizens' votes, and overpopulating or packing Republican districts, and thereby diluting the weight of those Arizona citizens' votes.[14] The second reason was because the commission's lawyers said the commission must create at least ten minority "ability-to-elect" districts to gain Justice Department preclearance approval.

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14. The total population of the underpopulated districts is 2,484,365, and the total population of the overpopulated districts is 3,907,652. See *Harris*, Suppl. J.A. at SA59.

Neither of these reasons justifies deviating from this Court's one-person, one-vote principle, nor is either reason consistent with Arizona's stated policy of equally populating legislative districts and limiting the influence of partisanship in redistricting.[15]

ARGUMENT

I. Partisan advantage does not justify deviating from the one-person, one-vote Equal Protection standard.

> *The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing – one person, one vote.*
>
> *Gray*, 372 U.S. at 381.

15. To be clear, this is a one-person, one-vote Equal Protection challenge. This is *not* a partisan gerrymandering claim and we do not claim reapportionment must be free of partisan interest. We acknowledge reapportionment is inextricably intertwined with partisan interests. But the Equal Protection Clause and this Court's post-*Reynolds* jurisprudence establishes the supervening constitutional principle of one-person, one-vote.

A. The Equal Protection Clause requires districts of as nearly equal population as practicable.

*Each state is required to "make an honest and good faith effort to construct districts *** as nearly of equal population as is practicable."*

Reynolds, 377 U.S. at 577.

The United States Constitution requires state legislative districts to be equally apportioned to assure the constitutionally-guaranteed right of suffrage is not denied by debasement or dilution. See *id.*; *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964).

This case asks, in the first instance, whether it is permissible for a redistricting commission to deviate from this Court's one-person, one-vote standard to confer a partisan benefit upon one political party to the detriment of another political party.

The district court noted that "[t]he Supreme Court has not decided whether or not political gain at a legitimate state redistricting tool." *Harris*, J.S. App. 62a (citing *Cox* v. *Larios*, 542 U.S. 947, 951 (2004) (Scalia, J., dissenting from summary affirmance)); see also *Id.* at 117a ("The Supreme Court has not decided whether partisan advantage itself is a permissible reason for population inequality, that is, whether it carries any weight or no weight against equality in the analysis.") (Wake, J., dissenting).[16]

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16. Though she assumed partisan advantage was not a legitimate justification, Judge Silver intimated partisan advantage may be an acceptable justification to deviate from the one-person,

The district court assumed that unequally apportioning Arizona's legislature to gain a partisan advantage for the Democrat party was not a legitimate reason to deviate from this Court's one-person, one-vote standard. *Harris*, J.S. App. at 36a.

The district court was right to make this assumption. This Court has never held obtaining a partisan advantage for one political party justifies unequally apportioning a state's legislative districts.

This Court established the ideal in *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Gray* v. *Sanders*, 372 U.S. at 379-80:

> [A]ll who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographic unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that

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one-vote ideal. See *Harris*, J.S. App. at 88a-93a. Judge Silver derived her inference from *Easley* v. *Cromartie*, 532 U.S. 234, 248 (2001), where districts were drawn to protect an incumbent. But Judge Silver failed to appreciate that states have a justifiable *non-partisan* reason to protect incumbents. Incumbents, by virtue of their tenure in office, have seniority in Congress or in the state legislature. Preserving a member of Congress who is, for example, the chairman of the Ways and Means Committee is a legitimate interest beneficial to the state as a whole not just a benefit to the member's specific political party.

> every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

In its following term, the Court addressed the "basic standards and stat[ed] the applicable guidelines for implementing [this Court's] decision in *Baker*." *Reynolds*, 377 U.S. at 559. And, citing *Wesberry*, 376 U.S. at 7, this Court held an apportionment which "'contracts the value of some votes and expands that of others' is unconstitutional." See also *Reynolds*, 377 U.S. at 559 (following and affirming *Baker* and *Wesberry*).[17]

In *Reynolds*, this Court held, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568. This Court further advised, "careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of

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17. Judge Kozinski summarized this point in *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1990) ("The principle of electoral equality assures that, regardless of the size of the whole body of constituents, political power, as defined by those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location.") (Kozinski, J., concurring and dissenting).

deviations from a strict population basis." *Id.* at 581. To that end, "the overriding objective must be substantial equality of population among the various districts so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.

To be sure, precise mathematical equality is not required. This Court acknowledges, "[a] State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." *Reynolds*, 377 U.S. at 578; see also *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983) (discussing legitimate state policies that may justify slight and incidental population deviations in congressional redistricting).

But this Court purposefully cabined these deviations by holding:

> [s]o long as the divergences from a strict population standard are *based on legitimate considerations incident to the effectuation of a rational state policy,* some deviations from the equal-population principle are constitutionally permissible ***. But neither history alone, nor economic *or other sorts of group interests*, are permissible factors in attempting to justify disparities from population–based representation.
>
> *Reynolds*, 377 U.S. at 579-80.[18]

18. Emphasis added.

The partisan interests the commission sought to advance in Arizona are inimical to the one-person, one-vote standard and where the Court can ferret them out and eliminate them by a judicially manageable standard – the one-person, one-vote standard – it should. See *Harris*, J.S. App. at 120a (Wake, J., dissenting) ("The low-hanging fruit is within the reach of the Equal Protection Clause even if the rest is not. Constitutional doctrine must mark out systematic population inequality, proven by statistics, as unreasonable, discriminatory, and actionable, provided no other legal reason saves it.").

B. The commission's systematic dilution and overweighing of Arizona citizens' votes violates the one-person, one-vote standard because it was driven by the desire to benefit one political party.

[The] Commission has been coin-clipping the currency of our democracy – everyone's equal vote – and giving all the shavings to one party, for no valid reason.

Harris, J.S. App. at 109a (Wake, J. dissenting).

Captain Renault (played by Claude Rains), the Vichy France policeman in *Casablanca*, famously protested to Rick Blaine (played by Humphrey Bogart), "I'm shocked, shocked, to find that gambling is going on in here!"[19] Partisanship in redistricting is like gambling in a casino. Of course partisanship is present. Politics is part of the

19. *Casablanca* (1942).

warp and woof of redistricting. We are not naive to this reality nor do we ask this Court to be. Judge Silver noted, "the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role." *Harris*, J.S. App. at 89a.

And all three judges agreed the commission's systematic dilution of the weight of votes by some voters while overweighing the votes of other voters arose from a desire to achieve a partisan advantage for the Democrat party. This was especially so for Districts 24, 26 and 8. See p. 12, *supra*. The only issue that divided the three judges was whether obtaining a partisan advantage was the "*predominant*" motive (Judge Clifton) or the "*actual and sole*" motive (Judge Silver). *Harris*, J.S. App. at 63a n.10, 94a.[20]

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20. A majority of this Court recently held an "independent" redistricting commission, in an effort to reduce partisan influence in redistricting, could draw Arizona's congressional districts with a zero-deviation reapportionment. This Court held the Elections Clause did not prohibit the commission from drawing equally-populated congressional districts. *Ariz. State Legislature*, 135 S. Ct. at 2677. This Court said this holding was consistent with a "core principle of republican government" that "voters should choose their representatives, not the other way around." *Id.* (citation omitted).

Arizona State Legislature did not address a redistricting scheme (such as here) that systematically underpopulated Democrat districts and correspondingly overpopulated Republican districts. As Judge Wake demonstrated, we do not need to infer a partisan motive for the commission's reapportionment of Arizona's legislature, the partisanship is statistically explicit. See *Harris*, J.S. App. at 120 ("This is about systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone."); see also pp. 19-20, *supra*.

Our point is simply this: The commission drew unequal districts to create partisan advantage for the Democrat party. It does not really matter that it was the Democrat Party that benefitted. It could have been the Republican Party. Our argument does not turn upon which party gains the advantage. This challenge is not about "group rights" of registered Republicans versus registered Democrats. This case concerns the right of *all* Arizona citizens to have their votes equally weighed as the United States and Arizona Constitutions guarantee.

The Equal Protection Clause protects individuals. The district court litigation was brought by individual Arizona voters to protect their right—and the rights of thousands of other Arizona citizens—to have their votes equally weighted when electing their state representatives.

C. Gaining partisan advantage for one political party is not a legitimate reason to deviate from this Court's one-person, one-vote principle.

[A]ll voters, as citizens of a State, stand in the same relation ***. *** Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race or economic status.*

Reynolds,
377 U.S. at 565-66.[21]

i. Partisanship does not justify violating the rights individual voters are guaranteed by the Equal Protection Clause principle of one-person, one-vote.

The *presence* of partisanship in reapportionment is not our complaint. Rather, our argument is that partisanship does not justify *unequally weighing* the votes of individual Arizona voters in violation of the one-person, one-vote principle.

Judge Silver noted, "[the Democrats on the Commission] had a much easier path available to them than engaging in the complicated task of [creating] minor population deviations: *the Commission could have set up districts of equal population* but drawn the district boundaries differently. *** [t]hat would have resulted in far greater partisan impact and the approach would

21. Internal citation omitted.

have had the added benefit of being almost impossible to challenge." *Harris*, J.S. App. at 99a (citation omitted, emphasis added).

To which we say: precisely. That is what the commission should have done – "set up districts of equal population." Had the commission done so (even if the commission did so to gain a partisan advantage) it is not likely we would be here.[22] But the commission did *not* equally apportion Arizona's legislative districts. Rather, the Commission intentionally *deviated* from this Court's one-person, one-vote ideal (by unequally weighing the votes of nearly two million Arizona voters) to confer partisan advantage upon the Democrat party.

As the district court noted below, this Court has *never* held that conferring a partisan advantage on one political party is a legitimate justification to violate the rights of individual voters to have their vote equally weighed. To the contrary:

> [This] Court has never suggested that certain geographic areas *or political interests* are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes

22. Of course, beyond the Equal Protection Clause, Arizona's Constitution also sought to reduce the extent to which partisan interest influenced reapportionment by requiring the commission to draw Arizona's legislative districts in light of traditional non-partisan criteria. The commission still needs to comply with these criteria even if they endeavored to draw equally-populated districts to accomplish a partisan end.

> justify departures from strict equality. Accordingly, *we have underscored the danger of apportionment structures that contain built-in bias tending to favor particular geographic areas or political interests* ***.
>
> *Abate* v. *Mundt*, 403 U.S. 182, 185-86 (1971).[23]

Of course, "minor deviations" in population may be acceptable when necessary to achieve some legitimate and rational state policy. But even then the state must "show with some specificity that a particular objective required the specific population deviations in its plan, rather than simply relying on general assertions." *Karcher*, 462 U.S. at 741.[24]

The Commission's plan fails on both points. First, conferring a partisan benefit upon the Democrat party was not a legitimate Arizona state policy. Indeed, all three judges concluded (or assumed) it was not. Further, the motivating animus for the citizen initiative that created the commission (Proposition 106) was the desire to *remove* partisanship from Arizona's redistricting process. The express and explicit objective of Proposition 106 was to reduce and restrain the degree that one party's political advantage shaped the redistricting of Arizona's legislature. See pp. 4-5, *supra*.

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23. Emphasis added and citation omitted.

24. *Karcher* is a congressional redistricting case but, once the challengers have (as here) shown the malapportioned districts were the result of illegitimate justifications, the burden shifts to the reapportioning body to justify the deviation. See pp. 49-51, *infra*.

Second, the commission offered no explanation why inflating the electoral weight of voters in Democrat districts and diluting the electoral weight of voters in Republican districts was required by *any* of the neutral objectives listed in the Arizona Constitution. To be sure, the Commission claimed it unequally populated Arizona's legislative districts to win Justice Department preclearance approval. But, as we explain below, this purported justification is invalid.

Justices Stevens and Breyer separately concurred in *Cox* supporting this Court's decision to affirm a district court striking down Georgia's redistricting plan because the reapportionment plan was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Cox* v. *Larios*, 542 U.S. 947, 947 (2004) (citing and quoting *Larios* v. *Cox*, 300 F. Supp.2d 1320, 1329 (N.D. Ga. 2004)).[25] Justice Stevens

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25. Several members of this Court have expressed long-standing skepticism about the role partisan interest plays in redistricting. See, *e.g.*, *Davis* v. *Bandemer*, 478 U.S. 109, 166 (1986) (gerrymandering "violates the Equal Protection Clause only when the redistricting plan serves 'no purpose other than to favor one segment – whether racial, ethnic, religious, economic, or political – that may occupy a position of strength at a particular time, or to disadvantage a politically weak segment of the community'") (citing *Karcher*, 462 U.S. at 748) (Powell, J., concurring in part and dissenting in part). In *Vieth* v. *Jubelirer*, 541 U.S. 267, 318 (2004), Justice Stevens explained in dissent that "when partisanship is the legislature's sole motivation – when any pretense of neutrality

went on to say, "I remain convinced that in time the present 'failure of judicial will,' will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles." *Id.* at 951. That same concern is even more compelling when the reapportionment scheme, as here, violates this Court's one-person, one-vote principle.

ii. The commission's unequally-populated legislative districts violate Arizona's constitutional requirement that the legislature be of equally-populated districts.

In addition to the Equal Protection Clause, the Arizona Constitution requires the Commission to equally populate its legislative districts.[26] See Ariz. Const. art.

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is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage – the governing body cannot be said to have acted impartially." See also *Vieth* v. *Jubelirer*, No. 02-1580, opinion announcement transcript, April 28, 2004 (Stevens, J., dissenting) ("neither Justice Scalia's plurality opinion, nor Justice Kennedy's opinion concurring in the judgment, contains a single kind word about political gerrymandering. Partisan gerrymandering like the English rotten borough enables representatives to choose their constituents rather than vice versa. It is an invidious, undemocratic and unconstitutional practice.") (available at: <http://www.oyez.org/cases/2000-2009/2003/2003_02_1580> (last visited Aug. 25, 2015)). And Justice Breyer in *Vieth* asked whether it is not the task of this Court to "police the outer fringe." *Vieth*, oral argument transcript (Dec. 10, 2003).

26. The district court did not reach the Arizona state law challenge to the commission's redistricting scheme. But Arizona's constitutional criteria are directly relevant to the Equal Protection challenge. This is so because the commission's deviation from the one-person, one-vote ideal must be justified by a legitimate and

IV, pt. 2, § 1(14)(A). The commission's failure to follow this admonition is undisputed and, in fact, the commission intentionally created significant population deviation in Arizona's legislative districts. No one disputes the math. Sixty percent of Arizona's state legislative districts are unequally populated, and the votes of nearly two million Arizona citizens are diluted or inflated under the commission's reapportionment scheme. *Harris*, J.S. App. at 109a (Wake, J., dissenting).

It is not just that the commission unequally populated the Arizona legislative districts *absent any* Arizona state policy that it do so. Rather it is that the commission did this *contrary to Arizona's express policy* that legislative districts be equally populated. The commission committed a sin of commission not omission. The commission's cardinal sin was to affirmatively, deliberately and intentionally violate Arizona's constitutional directive that legislative districts be equally populated.

The commission began with an unequal grid map with a more than four-percent deviation from the equal-population ideal, then the Commission deliberately redrew the grid map, and subsequent draft maps, to create *even greater inequality* of almost nine percent. Under the commission's direction, the Arizona legislature moved from a two and one-half percent deviation in the 2000 reapportionment, to a more than four-percent deviation in the grid map, to an almost nine-percent deviation in the commission's final map.

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rational state policy. Thus, it is necessary to ask, what state policy has Arizona adopted to guide the commission in its redistricting task? Arizona explicitly delineated these policies in its constitution.

Relying upon the advice of its advisors that the commission could draw malapportioned districts up to a ten-percent deviation, the commission crafted its scheme with deviations just shy of that mark. As the *per curiam* decision noted, the commission believed it could malapportion Arizona's legislature as long as it avoided transgressing the ten-percent deviation that would be a *prima facie* presumption of unconstitutionality.[27] *Harris*, J.S. App. at 30a.

II. Obtaining Justice Department preclearance is not a legitimate reason to deviate from the one-person, one-vote standard.

Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.

Shelby Cnty.,
133 S. Ct. at 2631.

Judge Wake found the commission's reapportionment scheme violated the Equal Protection Clause. We turn now to the *only reason* the other two district court judges found the commission's unequally-populated districts to be legitimate.

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27. See p. 11, *supra*; see also Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. of Const. Law 1001, 1063 (2005) ("If a plan's population deviation is very close to ten percent, this is itself evidence of some kind of bad faith, in that there was no real effort to achieve perfect equality, and the only goal was to avoid the *prima facie* unconstitutionality that would result from a deviation of more than ten percent.").

The only reason Judges Clifton and Silver upheld the commission's plan was because the commission's lawyers and consultants told the commission the Justice Department would not preclear the commission's plan unless it created ten minority ability-to-elect districts. To create these districts, the commission had to underpopulate these districts, and in so doing, inflate and dilute the weight of nearly two million Arizona voters' votes. See J.S. Suppl. App. at SA59; J.S. App. at 109a.

So, the question is, does a purported desire to obtain Justice Department preclearance under the Voting Rights Act justify unequally apportioning Arizona's legislature? This question is made even easier to answer because this Court's decision in *Shelby County* held the formula subjecting Arizona to section 5 preclearance to be unconstitutional. But first some background.

In the 1960s, six southern states formerly part of the Confederacy continued to discriminate against African-Americans by adopting election laws imposing devices and procedures such as poll taxes intended to deny black citizens the right to vote or conducting elections in a manner that diluted and diminished the weight of votes cast by black citizens. Congress found this discrimination to be an "evil" justifying "extraordinary measures," and adopted the Voting Rights Act in 1965 to address this extraordinary evil.

The Voting Rights Act departed from traditional principles of federalism and state sovereignty to suborn the election laws of the six affected states to supervening federal review and approval. Among these provisions

was the section 5 requirement that covered jurisdictions submit any change in their election laws to the Justice Department or to a three-judge panel in Washington D.C. before implementing the change. Reapportioning a state's legislature was an election law change covered by the preclearance requirement.

The Voting Rights Act was originally enacted for five years. The Act was subsequently renewed for successive periods, most recently in 2006. But despite these reenactments, the formula defining which states (or sub-jurisdictions) are covered by the preclearance requirement had not changed since 1975. Under the 1975 formula, Arizona and Alaska became subject to the preclearance requirements.

Originally "'covered' jurisdictions were those States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election." *Shelby Cnty.*, 133 S. Ct. at 2619. These original states included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. *Id.* at 2620. Arizona was not a covered jurisdiction.

In 1912, Arizona adopted an English-language literacy test as part of voter registration.[28] Arizona

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28. James T. Tucker, *et al.*, *Voting Rights in Arizona: 1982-2006*, 17 Rev. of Law & Soc. Justice 283, 285-86 (2008). Arizona Statute § 16-101 formerly provided:

> [a voter must be] able to read the Constitution of the United States in the English language in a manner showing that he is neither prompted nor reciting

repealed its English-language literacy test in 1972 and adopted bilingual ballots in 1974.[29]

Notwithstanding Arizona's repeal of literacy tests and Arizona's adoption of bilingual ballots, Arizona became a covered jurisdiction in September 1975 when Congress reauthorized the Voting Rights Act and amended its "definition of 'test or device' to include the practice of providing English-only voting materials in places where over five-percent of voting-age citizens spoke a single

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> from memory, unless prevented from so doing by physical disability. *** Is able to write his name, unless prevented from so doing by physical disability.

Apache Cnty. v. *United States*, 256 F. Supp. 903, 905 n.2 (D.D.C. 1966).

29. Brief of Arizona, Georgia, South Carolina, and South Dakota as *Amici Curiae* in Support of Petitioner, *Shelby County*, 2013 WL 50688, at *8 (filed Jan. 2, 2013) (citing *Hearing Before the S. Subcomm. on Constitutional Rights*, Committee on the Judiciary, 94th Cong. (Apr. 30, 1975) (testimony of Sen. Barry Goldwater explaining that Arizona did not use English-only ballots in 1974 or after)), stating:

> Because the Act references specific years, some States, such as Delaware, remain uncovered even though they used a test or device prohibited by Section 4(c) in both 1964 and 1968....Because voter registration fell below fifty percent after 1972 rather than during that year, Delaware need not seek preclearance for its laws. In contrast, Arizona was not using a test or device in 1975, when Congress amended the Act to add language minorities to the coverage formula.

See also Alia Beard Rau, *Supreme Court Nullifies Key Part of Voting Rights Act*, Ariz. Republic, June 25, 2013 ("Arizona adopted bilingual ballots in 1974.").

language other than English." *Shelby Cnty.*, 133 S. Ct. at 2620 (citing VRA Amendments of 1975 §§ 101, 102, 103; 28 C.F.R. pt. 51, App.) (citations omitted). Arizona became subject to the "extraordinary measure" of section 5 preclearance because of conditions that existed more than a generation ago.

In *Shelby County,* this Court found the section 4(b) coverage formula irrational and unconstitutional because it was based upon a state of affairs that had no relation to current conditions. It struck down the formula as it applied to nine states, including Arizona. The dissenting Justices noted, "The Court stops any application of section 5 by holding that § 4(b)'s coverage formula is unconstitutional." 133 S. Ct. at 2648 (Ginsburg, J. dissenting).

The formula in section 4(b) no longer applies to Arizona, and would be irrational if it did. Arizona repealed the English-language test in 1972, Arizona has provided bilingual ballots since 1974 and more than fifty percent of Arizona's voting age population is registered to vote.[30] More than fifty percent of Arizona citizens of voting age voted in the past two presidential elections.[31] Treating

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30. Statistical Abstract of the United States, Table 400 (2012), available at: <http://www.census.gov/compendia/statab/2012/tables/12s0400.pdf> (last visited August 25, 2015).

31. Arizona Secretary of State, State of Arizona Official Canvass, 2012 and 2008 general elections, available at: <http://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf> (last visited August 25, 2012) (showing 2,323,579 ballots cast in the 2012 presidential election), and: <http://apps.azsos.gov/election/2008/General/Canvass2008GE.pdf> (last visited August 25, 2012) (showing 2,320,851 ballots cast in the 2008 presidential election); see also U.S. Census Bureau

Arizona as if its election practices were frozen in amber during the Nixon Administration is irrational. But the commission's purported attempt to comply with this irrational, and now unconstitutional, provision was the purported justification for deliberately and intentionally apportioning Arizona's legislative districts unequally.

A. The Voting Rights Act does not require districts of unequal population

We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues.

Miller v. *Johnson*,
515 U.S. 900, 922 (1995).

The commission told the Justice Department its baseline benchmark map (the legislative apportionment from 2000) "contained seven ability-to-elect districts, comprised of one Native American district and six Hispanic districts." *Harris*, J.S. App. at 35a. To avoid retrogression and obtain preclearance, the commission needed to only adopt a map that did not reduce this number of minority ability-to-elect districts.[32]

Voting Age Population by Citizenship and Race, available at: <https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html> (last visited August 25, 2012) (showing 4,285,735 CVAP for Arizona between 2008 and 2012).

32. As Judge Wake notes even retrogression was not prohibited depending upon circumstances. *Harris*, J.S. App. at 124a, 135a (Wake, J. dissenting).

But, as the *per curiam* decision described it, the commission "overshot the mark" and tried to create ten minority ability-to-elect districts and an eleventh district (District 8) the commission could argue was a minority "opportunity-to-elect" district. All of these districts are underpopulated and to create these districts the commission had to dilute the weight of votes by citizens in Republican districts. Most importantly, neither the Justice Department nor the Voting Rights Act (even before *Shelby County*), required the commission to malapportion Arizona's legislature to create three additional Hispanic minority-majority or opportunity-to-elect districts in order to obtain preclearance.

As this Court explained in *Miller*, 515 U.S. at 922, "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis."

Judge Wake explained why, even before *Shelby County*, the desire for Justice Department preclearance does not justify unequally apportioning Arizona's legislative districts. Judge Wake rightly noted that no authority holds "systematic population inequality is a reasonable means of pursuing Voting Rights Act preclearance." *Harris*, J.S. App. at 107a (Wake, J., dissenting). Judge Wake supported his premise by noting:

(1) Arizona's redistricting policy commands the Commission to create equally-populated districts, not unequally-populated districts and, thus, Arizona state policy does not support creation of unequally-populated districts;

(2) The Voting Rights Act does not "require or authorize population inequality in legislative districting, directly or by implication." *Harris*, J.S. App. at 131a. To the contrary, "Section 5 non-retrogression and preclearance yield to population equality." *Ibid.* Indeed, this Court has explained, "the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the [Voting Rights] Act, ***** into tension with the Fourteenth Amendment." *Miller*, 515 U.S. at 927 (citation omitted);

(3) "[T]he Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5." *Harris*, J.S. App. at 132a (Wake, J., dissenting). And, if it did, the Constitution does not "grant Congress power to enact legislation requiring or permitting population inequality among voting districts." *Id.*; see also *Reynolds*, 377 U.S. at 555 n.29 (the right to vote "includes the right to have the vote counted at full value without dilution or discount");

(4) The Justice Department's own guidance manual states "[p]reventing retrogression under Section 5 does *not* require jurisdictions to violate the one-person, one-vote principle." *Harris*, J.S. App. at 134a-135a (quoting Justice Department *Guidance Concerning Redistricting under Section 5*, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011)) (emphasis added); and

(5) While a redistricting authority may "seek a margin of safety or go entirely beyond the Voting Rights Act" in the creation of additional minority ability-to-elect districts, "[n]o matter how many or few majority-minority, minority-influence, or cross-over districts a jurisdiction

tries to create, systematic population inequality is an illegal means to get there." *Harris*, J.S. App. at 136a-137a.

Judge Wake notes the commission's defense of its "systematic malapportionment" is that the federal Voting Rights Act *compelled* its unequally-populated legislative districts. *Harris*, J.S. App. at 137a-138a. This proposition (the Voting Rights Act made the commission dilute the weight of some citizens' votes and inflate the weight of other citizens' votes) is entirely at odds with the purpose for which the Voting Rights Act was adopted. And, more importantly, this notion of "having to" dilute some citizens' votes and inflate other citizens' votes is flatly contrary to the Constitution's guarantee of equal protection. A statute cannot command a constitutional violation. See *Marbury* v. *Madison*, 5 U.S. 137, 176-77 (1803).[33]

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33. In *Marbury*, this Court stated:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. *** It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

The commission cannot justify its scheme on the basis that it relied upon defective legal advice.[34] The commission unequally populated Arizona's legislative districts. This point is not disputed. And the commission's proffered explanation of wanting to create ten or eleven minority ability-to-elect districts makes no sense. The commission's purported Hispanic ability-to-elect districts included at least three districts where the Hispanic population was less than thirty-five percent, and far lower than that when Hispanic citizen-voting-age population is considered. *Harris*, J.S. App. at 243a-44a. The commission did not explain how these districts were (a) necessary to achieve preclearance; nor, (b) necessary to elect a Hispanic representative – even assuming all Hispanics citizens voted as a block.

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34. See *Harris*, J.S. App. at 76a, 140a-141a (*per curiam* opinion and Wake dissent in agreement). The defective advice Adelson provided the commission is a further reflection of how partisanship tainted the commission's redistricting process. Rather than obtain objective or bi-partisan advisors, the Democrat-inclined Chairwoman and Democrat commissioners hired advisors with a Democrat party background and bias and prevented the Republican members from obtaining an attorney of their choice. See p. 7, *supra*.

B. Even if the Justice Department could require Arizona to unequally populate its legislative districts, *Shelby County* eliminated that justification.

> *The Voting Rights Act is far from ordinary.* *** *the Act was "uncommon" and was "not otherwise appropriate," but was justified by "exceptional" and "unique" conditions.*
>
> *Shelby Cnty.*,
> 133 S. Ct. at 2630.[35]

The commission's unequal legislative districts will govern how Arizona citizens elect their state legislators until the next decade. Judges Clifton and Silver held these unequally populated districts are nonetheless constitutional because the commission drew the maps before *Shelby County*. This is like saying a "separate but equal" school segregation scheme is constitutional because the school was segregated when "separate but equal" schools were legitimate under *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), notwithstanding this Court's subsequent decision in *Brown* v. *Bd. of Education*, 347 U.S. 483 (1954).

While the commission drew Arizona's legislative map before *Shelby County*, the district court decided this case *after Shelby County*. The district court was bound to follow and apply this Court's holding in *Shelby County*. A court must decide a case consistent with current law.[36]

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35. Citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-35 (1966), abrogated by *Shelby County*.

36. See *Bradley* v. *Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974) ("[A] court is to apply a law in effect at the time it renders

Decisions invalidating unconstitutional laws apply to prior government acts, even when those acts were legal under then-existing law. See *Harper* v. *Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993); *Davis* v. *Mich. Dept. of Treasury*, 489 U.S. 803, 817 (1989).

The district court should have remanded the redistricting scheme with instructions to redraw the map in light of this Court's decision in *Shelby County*. Judge Wake explained that the commission "can shave their boundaries into equality for nothing compared to the years and millions they are spending to resist doing so." *Harris*, J.S. App. at 126a-127a (Wake, J., dissenting). But Judges Clifton and Silver did not agree. Instead, the *per curiam* decision defended the commission's systematic dilution of individual's votes on the basis of a pre-*Shelby County* state of affairs.

Judge Wake explained why Judges Clifton and Silver were wrong. "To allow the current map to govern successive election cycles until 2020 would give continuing force to Section 5 despite the unconstitutionality of applying it anywhere."[37] *Harris*, J.S. App. at 125a (Wake, J., dissenting).

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its decision had been made to prevent manifest injustice") (internal quotation and citation omitted); *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 534 (1991) ("In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar."); *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.").

37. Other district courts have followed this principle. See, *e.g.*, *Hall* v. *Louisiana*, 973 F. Supp.2d 675, 683 (M.D. La. 2013) ("In

C. This case is not about whether the commission acted "in good faith" but whether Arizona's legislative districts satisfy the one-person, one-vote principle.

[C]ongressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

Reynolds,
377 U.S. at 582 (1964).

The object of this litigation is to determine whether nearly two million Arizona citizens residing in sixty percent of Arizona's legislative districts have realized the Equal Protection Clause's one-person, one-vote guarantee and whether the one-person, one-vote principle will govern the election of Arizona's legislature until 2020.

Judges Clifton and Silver erred when they believed an admittedly unequal reapportionment scheme could be otherwise validated because, when the scheme was adopted, the commission acted in a "good faith" belief this was necessary to obtain Justice Department preclearance. We know of no authority for such a proposition. Indeed,

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sum, because the Supreme Court did not state a contrary intention in *Shelby County*, the general rule that a rule of law set out by the Court must be given retroactive effect in cases that are still under direct review applies."); *Bird* v. *Sumter Cnty. Bd. of Educ.*, 2013 WL 5797653, at *3 (M.D. Ga. Oct. 28, 2013) ("Nothing in the *Shelby County* decision precludes the retroactive effect typically afforded judicial decisions.") (citations omitted).

this Court has held precisely the opposite. "It is, therefore, safe to say that the congressional plan enacted in the end was required in order to obtain preclearance. It does not follow, however, that the plan was required by the substantive provisions of the [Voting Rights] Act." *Miller*, 515 U.S. at 921.

When this Court has upheld the reapportionment of state legislative districts with population deviations, it has done so only when the deviations are minor and necessary to accomplish some legitimate rational state policy that is neither arbitrary nor discriminatory. See Part I(c)(i), *supra*. The "bad faith" or "good faith" of the mapdrawer is not the question. The issue before this Court is whether the ultimate reapportionment scheme the commission adopted comports with the Equal Protection Clause guarantee of one-person, one-vote and, if not, whether there is a legitimate reason for the deviation. The commission's unequal reapportion does not comply with the guaranteed one-person, one-vote principle and the commission had no legitimate reason to unequally populate Arizona's legislative districts.

III. There is no ten-percent "safe harbor" allowing deviation from the one-person, one-vote requirement.

[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation.

Cox,
542 U.S. at 949.[38]

A. The ten-percent deviation concept is a burden-shifting rule, not a safe harbor.

The commission and its advisors wrongly believed there was a ten-percent safe harbor in state legislative redistricting. Judge Wake explained,

> There is a burden-shifting framework for population deviation claims. Generally, a legislative apportionment plan with a maximum population deviation greater than 10% creates a prima facie case of discrimination and therefore must be justified by the state. The plan may include 'minor deviations,' which is a technical term meaning less than 10%, free from arbitrariness or discrimination.

Harris, J.S. App. at 115a-116a.[39]

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38. Stevens, J., concurring, joined by Breyer, J.

39. Citing *Brown* v. *Thomson*, 462 U.S. 835, 842-43 (1983); see

The Arizona voters challenging the commission's reapportionment scheme satisfied this burden by showing the apportionment was "arbitrary or discriminatory" and not the result of a legitimate and rational state policy.[40]

Because the one-person, one-vote principle is of constitutional import, this Court has never held that there is *any* safe harbor for its breach. This point is particularly important because this Court has never said mapmakers are granted a ten-percent haven to draw electoral maps to achieve partisan advantage.

In *Brown* v. *Thomson*, this Court explained that a deviation of more than ten percent was "justified *on the basis of Wyoming's longstanding and legitimate policy* of preserving county boundaries. Particularly where there is no 'taint of arbitrariness or discrimination,' substantial deference is to be accorded the political decisions of the people of a State *acting through their elected representatives.*" 462 U.S. 835, 847-48 (1983) (citation omitted; emphasis added). But "[a]rbitrariness and discrimination disqualify even 'minor' population inequality within 10%." *Harris*, J.S. App. at 116a (Wake, J., dissenting); see also *Chapman* v. *Meier*, 420 U.S. 1,

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also *Connor* v. *Finch*, 431 U.S. 407, 417-18 (1977); *White* v. *Regester*, 412 U.S. 755, 764 (1973).

40. This Court has adopted a slightly stricter standard in congressional redistricting cases. *Tennant* v. *Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012) (the "standard [in congressional redistricting cases] does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the State justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality'") (quoting *Karcher*, 462 U.S. at 730); see also *Harris*, J.S. App. at 116a n.1.

25-26 (1975) (noting that redistricting plan with less than six-percent population deviation may not "necessarily *** be permissible in a court-ordered plan").[41]

So what do we make of this "ten-percent rule?" First, it is definitely not a "safe harbor" allowing reapportionment schemes that unequally apportions citizens such that their votes are diluted by just less than ten-percent. Second, the "ten-percent rule" is a burden-shifting standard derived from the deference this Court affords elected state legislatures. The "ten-percent rule" has never been invoked to defend an unequal apportionment drawn for partisan advantage by an unelected and politically unaccountable body such as the commission. More on this point below.

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41. *See also Rodriguez* v. *Pataki*, 308 F. Supp. 2d 346, 364 (S.D.N.Y. 2004) ("We think that *** the 'ten percent rule' is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion."); *Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F. Supp. 1022, 1033 (D. Md. 1994) ("[T]his Court holds that a plaintiff could, with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent."); *Larios*, 300 F. Supp. 2d at 1340-41; *Moore* v. *Itawamba Cnty., Miss.*, 431 F.3d 257, 259 (5th Cir. 2005) ("The formulaic [ten percent] threshold is not an absolute determinant. Rather, it effectively allocates the burden of proof. Population deviation less than ten percent, for example, is not *per se* nondiscriminatory and is not an absolute bar to a claim of vote dilution.")

B. Overturning the commission's unequal redistricting scheme does not require this Court to jump into the "political thicket" and engage in a standardless supervision of state reapportionment.

[T]he equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.

Cox, 542 U.S.at 949-50.[42]

i. The one-person, one-vote principle we ask this Court to apply is an easily administered justiciable standard.

Justice Frankfurter cautioned against this Court "enter[ing] this political thicket." *Colegrove* v. *Green*, 328 U.S. 549, 556 (1946). *Colegrove* was the case Justice Stevens referenced when he dissented in *Vieth*.[43]

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42. Stevens, J. concurring, joined by Breyer, J.

43. "When I was in law school in Illinois in 1946, a statute enacted over four decades earlier still defined the boundaries of congressional districts in that state. A suburban district with a population of 112,000 had the same representatives as an urban district with 900,000 residents. It was a case rejecting a constitutional challenge to that undemocratic allocation on justiciability grounds that Justice Frankfurter used his famous metaphor cautioning the judiciary to stay out of the political thicket. Fortunately the metaphor did not carry the day when our later decisions in Baker against Carr and Reynolds against Sims paved the path to our one-person, one-vote jurisprudence." *Vieth* v. *Jubelirer*, No. 02-1580, opinion announcement transcript, April 28, 2004 (Stevens, J., dissenting), available at: <http://www.oyez.org/cases/2000-2009/2003/2003_02_1580> (last visited August 25, 2015).

ii. Invalidating the commission's unequal reapportionment scheme does not violate this Court's deference to state legislatures drawing their own reapportionment.

As Justice Scalia explained in the plurality decision in *Vieth*, the principle reason this Court overruled its earlier decision in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), was because a majority found political gerrymandering is not justifiable because this Court was unable "to enunciate [a] judicially discernible and manageable standard." *Vieth*, 541 U.S. at 305-06.

These concerns are not present here. This is not a political gerrymandering case. We do not ask this Court to devise standards to ascertain political motivations nor to create a test for a politically "fair" reapportionment scheme. We are glad for this Court to "defer to state districting authorities' actual, substantial, and honest pursuit of a legitimate means for a legitimate purpose" even when the reapportionment results in minor population deviations. *Harris*, J.S. App. at 139a (Wake, J., dissenting).

Rather we ask this Court to apply its easily-administered requirement that, when a state's redistricting scheme deviates from the one-person, one-vote ideal of equally-populated legislative districts the deviation must be in furtherance of a legitimate justification based upon the traditional redistricting criteria of compactness, contiguity and preserving political subdivisions and communities of interest.

If a reapportionment scheme makes minor deviations from this equal-population standard to accommodate

one of these legitimate neutral considerations, the plan is appropriate. Or, even if a reapportionment scheme is devised to achieve political advantage for one political party but the districts are still equally-populated, the scheme need not be invalidated.

But when a redistricting scheme, as here, deviates from equally-populated districts to achieve an end that is not legitimate (such as gaining partisan advantage or obtaining preclearance under the Voting Rights Act formula this Court has declared to be unconstitutional), this Court should invalidate that scheme as violating the Equal Protection Clause. The trigger for this Court's scrutiny is the deviation from the ideal. If the districts are equal this Court need look no further. If the districts are not equally populated, this Court should inquire into the justification for the deviation and, if the reason for the deviation is not one of the traditional neutral redistricting criteria, the reapportionment scheme should be invalidated and the districts redrawn.[44]

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44. Justice Kennedy noted an additional concern the commission's reapportionment scheme presents. Allowing partisan advantage to justify deviating from the one-person, one-vote principle is also inconsistent with First Amendment principles of speech and association. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring)

The government is not permitted to burden or penalize citizens "because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Ibid.* (citing *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality op.); and *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). When "a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views" the First Amendment is implicated. *Ibid.*

As Justice Scalia observed, "[w]hen reviewing States' redistricting of their own legislative boundaries, we have been appropriately deferential." *Cox*, 542 U.S. at 951 (Scalia, J., dissenting from summary affirmance) (citing *Mahan* v. *Howell*, 410 U.S. 315, 327 (1973)).

But this principle of deference to sovereign state legislatures does not apply here. The proposition that federal courts should defer to States reapportioning their own legislature is grounded on principles of federalism and the understanding that state legislatures are politically accountable to their electorate. When state legislatures reapportion their own legislative districts the legislature is politically accountable to the electorate and, should the legislature malapportion its districts, subsequent legislatures can reapportion the state to correct an overreach by one party. See Justice Kennedy's comments during argument in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006).[45]

Justice Kennedy concluded, "First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights" based solely on their association with a political party or their concomitant expression of their political views. *Ibid.*

Addressing Justice Kennedy's concerns here does not require the Court to eliminate political considerations from reapportionment, or even conclude redistricting to achieve a political advantage creates a First Amendment claim. Instead, all we suggest is that, the desire to obtain partisan advantage, does not justify deviating from the one-person, one-vote ideal.

45. "If you know as a legislature when you do a decennial districting, that your program is going to be presumptively valid or not subject to partisan gerrymandering, then *** then you're *** liable to overreach. And it seems to me very dangerous for this Court

The commission is removed from electoral accountability. As Justice Thomas observed, the Arizona ballot initiative, Proposition 106, that created the commission "was unusually democracy-reducing. It did not ask the people to approve a particular redistricting plan through direct democracy, but instead to take districting away from the people's representatives and give it to an unelected committee, thereby reducing democratic control over the process in the future." *Ariz. State Legislature*, 135 S. Ct. at 2698 (Thomas, J. dissenting).[46] And the majority of this Court upheld this scheme against an Election Clause challenge. But there the commission drew equally-populated congressional districts. Not so here. And there is no mechanism to redraw these districts until the next decade.

Justice Kennedy's point in *Perry* was that partisan "overreach" in a reapportionment plan by a legislature is subject to oversight by the electorate and "can be corrected."[47] And Justice Thomas' point is that the Arizona

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to take away that control mechanism that exists so that legislatures know that there's a possibility that if they overreach, they can be corrected." Oral Argument Transcript (Mar. 1, 2006), pp. 22-23.

46. The *per curiam* decision concluded that "members of [the commission] cannot assert a legislative evidentiary privilege." *Harris*, J.S. App. at 55a. The district court reached this holding because, "[u]nlike legislators, the commissioners have no other public duties" and the commissioners "cannot hold elective office during or for the three years following their service on the Commission." *Ibid.*

47. See also Justice Kennedy's hypothetical in *Alabama Legislative Black Caucus*, Oral Argument Tr., pp. 8-10:

> Suppose there [is] Party A in 2001 [that] takes minorities out of heavily minority districts and puts

commission that created this reapportionment scheme is removed for any electoral oversight and thus not subject to correction by electoral oversight. The *per curiam* decision noted, "They [the members of the commission] cannot be defeated at the ballot box because they don't stand for election. Indeed, the process is not supposed to be governed by what happens at the ballot box." *Harris*, J.S. App. at 57a.

When a political party (and it does not matter which party) gains control of an unaccountable body reapportioning the state for the next decade, the process is unchecked by the restraints of political accountability to which Justice Kennedy referenced. This was demonstrated when two-thirds of the Arizona Senate and Arizona's Governor sought to remove the commission's chairwoman and could not do so. See *Brewer*, 275 P.3d at 1274.

Precisely because the commission is removed from political constraints and electoral accountability this Court should exercise scrutiny. Recall this Court's admonition that "careful judicial scrutiny" must be given when evaluating "state apportionment schemes." *Reynolds*, 377 U.S. at 581. This admonition particularly applies when the reapportionment scheme is drawn by a

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them into opportunity districts for political purposes. *** Party B then gets into power ten years later. It wants to undo what Party A did, and it puts them back into heavily populated districts. Is there a violation when Party B does that? *** but it's purely partisan. *** they find minority voters and put them into minority opportunity districts. Then the next party comes in and simply undoes it, and uses the same calculus, race?

politically-unaccountable body not subject to the electoral constraints Justice Kennedy noted.

The commission is not Arizona's Legislature. Nonetheless the majority of this Court upheld the commission's authority to redistrict Arizona's congressional delegation against an Election Clause challenge. This Court found the commission was created as a "high-minded" endeavor to remove partisanship from the congressional redistricting process. See *Ariz. State Legislature*, 135 S. Ct. at 2675; *id.* at 2691-92 (Roberts, C.J., dissenting). But, even if one believes the endeavor succeeded and the commission truly operated in an "independent" and non-partisan manner, the commission's reapportionment is still subject to judicial scrutiny and the one-person, one-vote principle of the Equal Protection Clause.

For Arizona's experiment, seeking to remove politics from redistricting to succeed, the work of the commission must still be subject to judicial review and the one-person, one-vote principle.

CONCLUSION

Our Constitution protects people not percentages.[48] The malapportioned legislative districts the commission created mean the votes of nearly two million Arizona citizens are diluted or inflated. This is unacceptable and unjustified. The Equal Protection Clause "guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds*, 377 U.S. at 566. A state can deviate from this Court's one-person, one-vote principle by minor deviations but only "based on legitimate considerations incident to the effectuation of a rational state policy ***." *Id.* at 579. And the reason for the deviation must be "free from any taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710.

Arizona has no policy directing its legislature be reapportioned to tilt the political playing field in favor of the Democrat Party. And unequally apportioning Arizona's legislature for the next decade to obtain preclearance from Justice Department lawyers when this Court has struck down the preclearance scheme in *Shelby County* is not a legitimate reason to dilute or inflate the votes of nearly two million citizens in sixty-percent of Arizona's legislative districts. By doing so the commission denied individual Arizona citizens the constitutionally-guaranteed right to equal protection by diluting the weight of their votes.

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48. See *Reynolds*, 377 U.S. at 562. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."

The simplest conclusion is found in four words: "Judge Wake is right." Judge Wake's analysis and reasoning was not only correct as a matter of undisputed fact, his conclusions are a faithful application of this Court's Equal Protection Clause jurisprudence.

Accordingly this Court should reverse and remand the district court's *per curiam* decision and direct the commission to reapportion Arizona's legislature conforming to the requirements of the United States and Arizona Constitutions which require each legislative district be equally populated.

Respectfully submitted,

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